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August 20, 2018

VIA ELECTRONIC SUBMISSION

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-A-01

To Whom It May Concern,

On behalf of the Lawyers' Committee for Civil Rights Under Law (hereinafter Lawyers' Committee), we write to submit comments in response to the above-docketed Advanced Notice of Proposed Rulemaking (hereinafter ANPRM) concerning reconsideration of the Implementation of the Fair Housing Act's Discriminatory Effects Standard, also known as the Disparate Impact Rule (hereinafter Rule), promulgated in 2013 by the U.S. Department of Housing and Urban Development (hereinafter HUD).

The Lawyers' Committee is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee has litigated numerous fair housing claims under the Fair Housing Act (hereinafter FHA), many of which have raised disparate impact claims. Through this experience, we have seen firsthand that disparate impact claims under the FHA are essential to meeting the FHA's central goal of integrating our communities. We have championed the FHA's disparate impact standard as a crucial tool for securing opportunity for members of groups still struggling under the weight of historical and present-day discrimination. When the Disparate Impact Rule was under consideration, the Lawyers' Committee submitted extensive comments in support of the Rule. This support also included filing amicus briefs in the Supreme Court arguing that disparate impact claims are cognizable under the FHA in *Magner v. Gallagher*, No. 10-1032, *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507, and *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, No. 13-1371.

On May 15, 2017, HUD published a notice pursuant to Executive Order 13771 that invited public comments identifying existing regulations that were outdated, ineffective, or extremely burdensome.[1] HUD received comments supportive of the Rule, asserting that it was consistent with the Supreme Court decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (hereinafter ICP) and that no revision to the Rule is necessary or justified; others were critical of the Rule because it was alleged to be inconsistent with the ICP. In addition, the Department of Treasury issued a 162 page report entitled "A Financial System that Creates Economic Opportunity" in October 2017, which included a short recommendation (among scores of others not relevant to the Rule) that HUD reconsider use of the Rule, but only as it applied to homeowners' insurance. Based on these responses, HUD issued the ANPRM seeking public comment on whether the Rule is inconsistent with ICP and should be revised.[2]

We submit that the Rule is fully consistent with ICP and would strongly object to any revisions to it. A full review of the case law since the 2015 ICP decision demonstrates that courts have explicitly adopted the burden-shifting approach of the Rule. First, an analysis of the ICP case itself plainly demonstrates that the court adopted the Rule's burden-shifting standard. Second, several subsequent decisions have affirmatively held that the Rule is consistent with ICP and no court has held that the Rule is inconsistent with ICP. Third, HUD itself has taken the position that the Rule is consistent with ICP.

I. The Rule is Fully In Accordance with the Law

A. A Review of the ICP Case Demonstrates that that Rule Was Considered by the Supreme Court and Approved

ICP was initiated in 2008. After a bench trial, the district court found in favor of the plaintiff on its disparate impact claim in 2012. 860 F. Supp.2d 312 (N.D. Tex. 2012). The Texas Department of Housing and Community Affairs appealed this decision. While the appeal was pending, HUD promulgated the Rule on February 15, 2013 "to formalize HUD's long-held interpretation of the availability of 'discriminatory effects' liability under the Fair Housing Act. . . and to provide nationwide consistency in the application of that form of liability." HUD noted that over a four decade period, eleven of the twelve courts of appeals had recognized a discriminatory effects standard but that a "small degree of variation has developed in the methodology of proving a claim of discriminatory effects liability" and this "inconsistency threaten[ed] to create uncertainty as to how parties' conduct will be evaluated." HUD explicitly noted that the Rule was "not establishing new substantive law [but] rather, this final rule embodies law that has been in place for almost four decades."[3]

On appeal, the Fifth Circuit held that disparate impact claims under the FHA are cognizable and explicitly "adopt[ed] the burden-shifting approach found in Rule for disparate

[1] 82 Fed. Reg. 22,344.
[2] Treasury recommended reconsideration of the Rule with respect to homeowners' insurance; the ANPR seeks comments on whether the whole Rule should be revised even though there were many comments recommending no revision.
[3] 78 Fed. Reg. 11,460, 11,462.

impact claims under the FHA." 747 F.3d 275, 282-83 (5th Cir. 2014). The Supreme Court then granted certiorari and held that disparate impact claims are cognizable. It referenced the burden-shifting analysis for proving a disparate impact claim set forth in Title VII cases and in the Rule, 135 S. Ct. 2507, 2522-23, and did not disturb the court of appeals decision explicitly adopting the approach found in the Rule. The Court's observation that "disparate-impact liability *has always been* properly limited in key respects," 135 S. Ct. at 2522 (emphasis added), is further evidence that it was not calling for a significant departure from preexisting FHA and Title VII precedents.[4] Indeed, the Supreme Court decision cites the Rule approvingly in support of its analysis. *See id*. at 2522-23. (giving covered entities "leeway to state and explain the valid interest served by their policies . . . analogous to the business necessity standard under Title VII").

Following the remand from the Supreme Court, the Fifth Circuit remanded the case to the district court for further proceedings. 795 F.3d 509 (5th Cir. 2015) (per curiam). The district court concluded that "[a]s a result of the Fifth Circuit's decision adopting the HUD regulations, and the Supreme Court's affirmance (*without altering the burden-shifting approach)*, the . . . proof regimen [set forth in the Rule] now applies to ICP's disparate impact claim under the FHA." 2015 WL 5916220 at *3 (N.D. Tex. October 8. 2015) (emphasis added). The court went on to hold that in light of the Supreme Court decision, "additional consideration of the prima facie case requirement is both necessary and appropriate." But such additional consideration was still to be "conducted pursuant to the burden-shifting regimen adopted by HUD and the Fifth Circuit." *Id.* at *4.

In sum, the ICP case demonstrates that while the Supreme Court decision shed new light on the requirements of a prima facie case of disparate impact liability, nothing in it is inconsistent with the Rule. Indeed, the district court's analysis on remand explicitly applied the burden shifting analysis of the Rule.

B. Decisions Since ICP Have Affirmatively Held that the Rule is Consistent with ICP

Since ICP, several courts have held, or made clear in their analysis of disparate impact claims, that the Rule is consistent with ICP. In *MHANY Mgmt. Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016), the Second Cicuit held that the "Supreme Court *implicitly adopted HUD's approach, see Inclusive Communities Project, 135 S. Ct. at 2518"* (emphasis added). Two days later, the Ninth Circuit decided *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 512-13 (9th Cir. 2016), *cert. den.* 137 S. Ct. 295 (2016) and cited the Rule in describing the three prong analytical structure set forth in ICP.

Subsequently, the district court in *Ave. 6E Invs.* denied the defendant city's motion for summary judgment. The City argued that even if the Rule supports plaintiffs' position, the court must reject HUD's interpretation of the FHA given the Supreme Court's inconsistent interpretation of disparate impact liability in ICP. But the district court rejected that argument

[4] Similar to HUD's recognition in the Rule of the unanimous recognition of disparate impact claims by the courts of appeal at the time of the Rule, the Supreme Court noted at the time of the 1988 Amendments to the FHA that all courts of appeals that had addressed whether disparate impact claims are cognizable (nine) had answered in the affirmative. 135 S. Ct. at 2519.

holding that "HUD's regulations are consistent with [ICP] and entitled to deference." 2018 WL 582314, at *7, n. 49 (D. Ariz. 2018).

In *Prop. Cas. Insurers Ass'n of Am. v. Carson*, (hereinafter PCIA), the plaintiff, an insurance industry association, challenged the Rule on the same grounds as that suggested by the Department of Treasury in its 2017 Report -- that application of the Rule to homeowners' insurance is contrary to the FHA as interpreted by the Supreme Court in ICP. Before the Supreme Court ICP decision, the district court rejected plaintiff's argument that the Rule was contrary to law. 66 F. Supp. 3d 1018, 1052 (N.D. Ill. 2014) (finding HUD's adoption of the three step burden-shifting framework a reasonable interpretation of the FHA). After the Supreme Court decision, plaintiff moved to amend its complaint to add an allegation that the Rule was inconsistent with ICP. The district court denied this part of the motion, holding that "[i]n short, the Supreme Court in *Inclusive Communities* expressly approved of disparate-impact liability under the FHA and *did not identify any aspect of HUD's burden-shifting approach that required correction*. 2017 WL 2653069, at *8-9 (N.D. Ill. June 20, 2017) (emphasis added).

In *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 126-27 (Mass. 2016), the Massachusetts Supreme Judicial Court reached the same conclusion. In considering a disparate impact claim in that case, the court followed the "burden-shifting framework laid out by HUD and adopted by the Supreme Court in ICP."

Several other courts have relied interchangeably on ICP and the Rule in conducting their disparate impact analyses, demonstrating a recognition of the consistency between the two. *See e.g., Borum v. Brentwood Village, LLC* 218 F. Supp. 3d 1, 21-22 (D.D.C. 2016); *Azam v. City of Columbia Heights*, 2016 WL 424966, at *10 (D. Minn. 2016), *aff'd*, 865 F.3d 980 (8th Cir. 2017); *Paige v. New York City Hous. Auth*., 2018 WL 1226024, at *3 (S.D.N.Y. 2018); *Crossroads Residents Organized for Stable & Secure ResiDencieS v. MSP Crossroads Apartments LLC*, 2016 WL 3661146, at *6 (D. Minn. 2016); *Oviedo Town Center II v. City of Oviedo, Florida*, 2017 WL 3621940, at *4 (M.D. Fla. 2017); *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 2017 WL 2984048, at *8 (N.D. Tex. 2017).[5]

Finally, attached is a list of 27 other decisions entered since ICP addressing FHA disparate impact claims. ICP includes cautionary language about imposing disparate impact liability, and most of these cases address this cautionary language. But *none* indicates any inconsistency between ICP and the Rule, nor does any case discuss a need to modify the Rule. Rather, as the district court concluded in PCIA: "While *Inclusive Communities* cautions courts about imposing disparate-impact liability under certain circumstances, . . . these concerns are best left for analysis in specific cases. . . ." 2017 WL 2653069, at *9. That is what the courts are doing in these cases, and none indicates any need to modify the Rule.

C. HUD Itself Has Taken the Position that the Rule is Consistent with ICP

Since ICP was decided in 2015, HUD has taken positions in two cases opposing arguments that the Rule is inconsistent with ICP. First, in *American Insurance Association v. Dep't of Hous. & Urb. Dev.,* No. 1:13-cv-00966-RJL (D.D.C) (hereinafter AIA), where the plaintiffs are challenging the Rule and its application to homeowners' insurance, the plaintiffs

[5] Plaintiffs in *Oviedo* and *Lincoln Properties* have appealed the decisions in those cases. They challenge application of the analysis to the facts in those cases but not the analytical framework set forth in the Rule and ICP.

argue that the Rule is inconsistent with ICP in their motion for summary judgment filed in June 2016. In its August 30, 2016 response to this motion, HUD stated that "*Inclusive Communities* is fully consistent with the standard that HUD promulgated" in the Rule, citing preexisting Title VII and FHA law. Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 65, at 33. HUD then discussed in detail ICP's cautionary language concerning causality, statistical disparities, and policies subject to disparate impact analysis, asserting that Rule was fully consistent with this language and did not require modification.

Later, when the present Administration assumed responsibility for the case, HUD successfully sought a continuance of oral argument of the summary judgment motion in February 2017 "to permit new leadership at the Department of Housing and Urban Development an opportunity to become familiar with the issues in this case." Then, on April 21, 2017 in the PCIA case (which raises the same claims as AIA), and after HUD had had the opportunity to complete its review of its position, it took the same position as it had AIA in opposing PCIA's motion for leave to amend its complaint that it had in summary judgment briefing in AIA, stating:

> "[T]he Supreme Court's holding in *Inclusive Communities* is entirely consistent with the Rule's reaffirmation of HUD's longstanding interpretation that the FHA authorizes disparate impact claims. 135 S. Ct. at 2516-22. And the portions of the Court's opinion cited by [PCIA]—which discuss limitations on the application of disparate impact liability that have long been part of the standard—do not give rise to new causes of action, nor do they conflict with the Rule. *See id*. at 2522-25 ("[D]isparate-impact liability has always been properly limited in key respects . . . ."). Indeed, nothing in *Inclusive Communities* casts any doubt on the validity of the Rule. To the contrary, the Court cited the Rule twice in support of its analysis. *See* 135 S. Ct. at 2522-23."

HUD's Opposition to Plaintiff's Motion to Amend Complaint. PCIA, ECF No. 122 at 9. As noted above, the district court agreed with HUD in its June 20, 2017 decision, holding that "the Supreme Court in *Inclusive Communities* expressly approved of disparate impact liability under the FHA and did not identify any aspect of HUD's burden-shifting approach that required correction." 2017 WL 2653069 at *9.

Given the recent position taken by HUD that the Rule is fully consistent with ICP, it is difficult to understand why HUD is now seeking comment on whether the Rule should be modified. HUD has strongly endorsed the existing Rule in its position in these two cases and there is *no* case law that finds any inconsistency between the Rule and ICP, nor any that suggests modification of the Rule is necessary or appropriate. Accordingly, HUD should take no further steps to consider modification of the Rule.

II. Exclusionary Zoning Cases Help Provide Answers to Questions Posed in HUD's ANPRM

In the ANPRM, HUD posed a series of specific questions. The Lawyers' Committee has extensive experience litigating disparate impact claims in exclusionary zoning cases including the *Mhany Management* case which was the first post-ICP court of appeals decision that held

that the Supreme Court implicitly adopted the Rule. Exclusionary zoning cases form a body of law that helps provide answers to many of the questions in the HUD notice.

In recognizing disparate impact claims under the FHA, the ICP decision initially focuses on the long history of public and private discrimination causing residential segregation which led to passage of the FHA. 135 S. Ct. at 2515-16. It found that the FHA was enacted to eradicate discriminatory housing practices and that "[r]ecognition of disparate-impact claims is consistent with the FHA's central purpose." *Id.* at 2521. It placed emphasis on exclusionary zoning cases stating that:

> "unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification reside at the heartland of disparate-impact liability." (citing three exclusionary zoning cases). *Id* at 2521-22.[6]

Indeed, the first case to establish disparate impact liability under the FHA – *United States v. Black Jack*, 508 F.2d 1179 (8th Cir. 1974) – was an exclusionary zoning case. Today, exclusionary zoning remains a pervasive problem in segregated metropolitan regions across the country. The importance of disparate impact liability to exclusionary zoning claims attacking segregation was especially well articulated by the Ninth Circuit in *Avenue 6E Investments LLP*, 818 F.3d at 510: "Indeed, the wisdom of disparate-impact liability under the FHA is that it addresses local government's (as well as other government's) historical racism and the continuing persistence of housing segregation not by interjecting racial quotas as the end goal of municipal zoning decisions, but rather by ensuring that municipalities making such decisions will base them on legitimate objectives rather than on discriminatory reasons, conscious or otherwise."

Question 1: Are the burdens of production and persuasion appropriately assigned in the Rule?

Exclusionary zoning cases before and after ICP have, like the Rule, always placed the burden of persuasion for the second prong of the burden-shifting analysis on the defendant. *See e.g. Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 936 (2d Cir. 1988) ("the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest"). Since ICP, exclusionary zoning cases (and all other disparate impact cases) have not deviated from placing this burden for proving the second prong of the disparate impact analysis on the defendant. See *MHANY Mgmt. Inc,* 819 F.3d at 617 (2d Cir. 2016) ("the defendant or respondent may rebut the prima facie case by proving that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."); *6E Invs., LLC v. City of Yuma,* 818 F.3d at 512 (the second prong of the burden-shifting analysis "does not impose a duty on a municipality to approve all zoning applications in a particular price range. Instead, as the Supreme Court made clear in ICP, such a showing merely requires the city to demonstrate

[6] Moreover, in recognizing disparate impact liability, the Court took note of the "crucial importance that the existence of disparate-impact liability" that had been recognized in all nine Courts of Appeals to have addressed the question by the time of the 1988 Amendments. Six of nine cases cited were zoning or land use cases. *Id.* at 2519.

that the action that creates an adverse effect on minorities is supported by adequate justification").

It would be inappropriate to change the defendant's burden to justify a policy with a discriminatory effect to one of production, when it is now, and always has been in all FHA cases, a burden of persuasion. Such a change would mean that the defendant could meet the step two justification requirement in an exclusionary zoning case by, for example, merely asserting that denser development "would make traffic worse." Placing the burden of persuasion for step two on plaintiff would require plaintiff to prove a negative in this situation – that new multi-family housing would not make traffic worse. Such a change would effectively convert the disparate impact standard into something very similar to the intentional discrimination standard articulated by the Supreme Court in the *McDonnell Douglas Corp. v. Green* line of cases because a plaintiff would essentially have to prove that a defendant's asserted justification was pretextual.

Arguments have been made in opposition to the Rule that the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989) requires that the burden on the respondent under the second prong be only a burden of production, not persuasion. This argument has no merit for several reasons:

1. The only time that *Wards Cove* is cited in the Court's opinion in ICP is in connection with a discussion of step one of the analysis (i.e., the requirement that the plaintiff prove that a policy causes the alleged disparity in establishing a prima facie case). *See* 135 S. Ct. at 2523. There is no indication that the Court viewed *Wards Cove* as applying to step two of the analysis.

2. In ICP, the Supreme Court held that FHA disparate impact claims should be governed by the burden shifting framework developed to determine liability in Title VII. It cites *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971*)*, the foundation of the Title VII burden shifting standard proof. More specifically, with respect to the burden in step two of the analysis, the Court states that "[a]fter a plaintiff meets it burden of establishing a prima facie showing of disparate impact, the burden shifts to the defendant to 'prov[e] that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.' § 100.500(c)(2))." 135 S. Ct. 2514-15. Later, the Court notes "that [step 2] of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability by giving housing authorities and private developers leeway to state and explain the valid interest served by their policies. *See* 78 Fed. Reg. 11,470. . . Just as [in *Griggs*,] housing authorities and private developers [must] be allowed to maintain a policy *if they can prove* it is necessary to achieve a valid interest." *Id.* at 2522-23 (emphasis added).

3. Neither *Wards* Cove nor other cases relied on for arguing that the burden is only one of production, including *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Gross v. FBL Fin.* Services, 557 U.S. 167 (2009), hold that any particular construction of the FHA follows from the analysis of the statutes in those cases. Indeed, in *Meacham v. Knolls Atomic Power Lab*, 544 U.S. 84, 100 (2008), the Court held that it is a misreading of *City of Jackson* to say that *Wards Cove* requires that the burden of justifying a challenged policy fall on the plaintiff ("It is not very fair to take the remark about *Wards Cove* in *City of Jackson* as requiring such a wasteful and confusing structure of proof."). And in

Gross, the Court said that "courts must be careful not to apply rules applicable under one statute to a different statute with critical and careful examination." 557 U. S. at 174.

4. One of the main rationales for the Rule was to clarify disparate impact analysis under the FHA. This rationale would be undermined by placing the burden of persuasion for step 2 on the plaintiff, something that has never been required in FHA cases. Moreover, Congress rejected placing the burden of persuasion on plaintiff in its 1991 amendments to Title VII and thus there has been little court experience in applying *Wards Cove* in Title VII cases or any other area. To use *Wards Cove* now for FHA impact claims would launch a new era of uncertainty and confusion and displace the consistent decades-long experience of placing this burden on the defendant.

5. HUD itself has rejected this argument. In its Motion for Summary Judgement in AIA, it stated that "[i]n proposing the Rule, HUD specified that its standard of liability 'is consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII.'" Similarly, in PCIA, HUD opposed plaintiff's challenge to the Rule on the basis that it is contrary to the approach the Supreme Court adopted for disparate impact claims in *Wards Cove*. The district court agreed with HUD and held there is "no basis for the Court to invalidate HUD's burden-shifting approach." 66 F. Supp. 3d at 1053. Subsequently, in denying plaintiff's motion to amend the complaint after ICP, the court confirmed this decision. 2017 WL 2653069, at *8.

Question 2: Are the second and third steps of the Rule's burden-shifting framework sufficient to ensure that only challenged practices that are artificial, arbitrary and unnecessary barriers result in disparate impact liability?

ICP strongly supports an affirmative answer to this question. For example, it emphasizes that the availability of disparate impact liability is crucial in exclusionary zoning cases in "stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances," 135 S. Ct. at 2522, and then goes on to describe how step two of the Rule ensures a limitation of liability to arbitrary practices, stating that "an important and appropriate means of ensuring that disparate impact is properly limited is to give housing authorities and private developers leeway to state and explain the valid interests served by their policies," *Id.* 2522 (specifically citing the Rule).

Step three of the Rule strengthens the limitation of disparate impact liability to artificial, arbitrary, and unnecessary barriers. In order to prevail in the event that defendant or respondent is able to meet its burden of proving the challenged policy serves a legitimate interest, the plaintiff or charging party has the burden of proving that the "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500((c)(3). To meet this burden, plaintiff must produce proof "supported by evidence, and may not be hypothetical or speculative." 78 Fed. Reg. at 11,473. Prior to the Rule, one exclusionary zoning case placed the burden for step three on the defendant. *See Huntington Branch*, 844 F.2d at 936. But, in *Mhany Management*, a post-ICP exclusionary zoning case, the court held that the *Huntington* standard must give way to the Rule and remanded the case to district court to examine whether the

plaintiff had met this burden.[7] By requiring that the burden for step three be placed on the charging party, the Rule provides additional assurance that only artificial, arbitrary, and unnecessary practices will be subject to disparate impact liability.

Question 3: Does the Disparate Impacts Rule's definition of ''discriminatory effect'' in 24 C.F.R. § 100.500(a) in conjunction with the burden of proof for stating a prima facie case in 24 C.F.R. § 100.500(c) strike the proper balance in encouraging legal action for legitimate disparate impact cases while avoiding unmeritorious claims?

The definition of discriminatory effect under the Rule recognizes that a challenged practice may have an illegal effect in either of two ways: (1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns. 78 Fed. Reg. at 11,469 (describing 24 C.F.R. § 100.500(a), citing *Huntington Branch*, 844 F.2d at 937).

The perpetuation of segregation prong of 24 C.F.R. § 100.500(a) is particularly important because it directly supports the core mission of the FHA to replace segregated neighborhoods with truly integrated neighborhoods. *See* 78 Fed. Reg. at 11,469. Like the concentration of low-income housing in poor areas, the practice of exclusionary zoning, even when facially neutral, is deeply rooted in past intentional efforts to maintain residential racial segregation. In fact, in the aftermath of the Supreme Court's 1917 decision *Buchanan v. Warley*, striking down explicit racial zoning, there was a rapid proliferation of exclusionary zoning ordinances in suburban communities and predominantly white sections of cities across the country.[8] Unduly restrictive zoning and land use policies, such as apartment bans or large minimum lot-size requirements, disproportionately deny housing choice to racial and ethnic minorities, as well as persons with disabilities. When municipalities that engage in exclusionary zoning are comparatively affluent, with racially and ethnically homogeneous communities, maintaining these policies perpetuates residential segregation. This occurs because, throughout much of the United States, there are strong correlations between race, ethnicity, disability status, and socioeconomic status, and because lower income people are more likely to reside in denser housing types like apartments.

Both types of discriminatory effect are subject to the same three step burden-shifting scheme set forth in 24 C.F.R. § 100.500(c) of the Rule. This framework is designed to ensure that only challenged practices that are artificial, arbitrary, and unnecessary barriers result in disparate impact liability, and ICP's adoption of this framework demonstrates that it strikes the

[7] 819 F.3d 623. On remand, the district court rejected an argument, again based on *Wards Cove*, that the plaintiff must prove that the asserted less discriminatory alternative was "equally effective" to the challenged zoning decision, stating that: "HUD's interpretation could not be clearer that a plaintiff's burden under 24 C.F.R. § 100.500(c)(3) is not to show that the less discriminatory practice would be equally effective, but merely that it must serve a defendant's legitimate interests." 2017 WL 4174787, at *8 (E.D.N.Y. Sept. 19, 2017). See also, PCIA, 66 F. Supp. 3d at 1052 ("[I]n *Wards Cove*, the Supreme Court held that any alternative practice the plaintiff offered in the third step must be 'equally effective' as the challenged practice. HUD, on the other hand, has determined that an 'equally effective' standard is inappropriate").

[8] In fact, in a decision striking down a post-*Buchanan* race-neutral zoning ordinance, in the dispute in which the Supreme Court would ultimately recognize local zoning authority in *Village of Euclid v. Ambler Realty Co.*, the district court judge explicitly recognized that maintaining racial segregation was one of the chief purposes of zoning.

proper balance for avoiding unmeritorious claims. The burden on plaintiff to establish a discriminatory effect (24 C.F.R. § 100.500(a)) is usually done by careful statistical analysis supported by expert testimony. The Rule does not define a specific method of statistical analysis. But HUD explains the reasons for this in the Rule, noting (1) "the purpose of the Rule . . . is to formalize a long-recognized legal interpretation and establish a uniform legal standard, rather than to describe how data and statistics may be used in the application of the standard;" and (2) "[g]iven the numerous and varied practices and wide variety of private and governmental entities covered by the Act, it would be impossible to specify in the rule the showing that would be required to demonstrate a discriminatory effect in each of these contexts." *See* 78 Fed. Reg. 11,468.

Defendants always can, and usually do, vigorously challenge whether a plaintiff has met the burden of proving discriminatory effect. In any event, the dispute at step one does not end the analysis. Further protection against unmeritorious claims is provided defendants in the second prong of 24 C.F.R. § 100.500(c)(2) where, even if a plaintiff is successful in proving a prima facie case of disparate effect, the defendant still has the opportunity to establish that the "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant." As the Court stated in ICP, "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies." 135 S. Ct. at 2522.

4. **Should the Disparate Impact Rule be amended to clarify the causality standard for stating a prima facie case under Inclusive Communities and other Supreme Court rulings?**

In ICP the Supreme Court put emphasis on a "robust" causality requirement in disparate impact analysis, finding that a "disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." 135 S. Ct. at 2523. At the same time, the Court also noted that the Rule has an almost identical requirement – that the plaintiff "has the burden of proving that a challenged practice *caused or predictably will cause* a discriminatory effect." 24 C.F.R. § 100.500(c)(1) (emphasis added). And the Court never indicated any inconsistency between the robust causality requirement and the Rule. 135 S. Ct. at 2514. Indeed, the Rule reinforces the causality requirement in its definition of discriminatory effect stating that "a practice has a discriminatory effect only if '*it actually or predictably results* in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns . . . because of [protected class status].'" 24 C.F.R. § 100.500(a) (emphasis added).

The "robust" causality requirement noted in ICP has been one of the issues most carefully considered in post-ICP cases.[9] But none of these cases has suggested in any way that this

[9] Part of the robust causality requirement concerns identifying what constitutes the policy or policies that cause the disparity at issue. This issue has also been considered in many post-ICP cases. Two courts have made clear that a zoning decision constitutes a policy subject to disparate impact analysis. *See Mhany Mgmt,* 819 F3d. at 619 (zoning change at issue required passage of a local law, "falls well within a classification of a "general policy"); *Ave. 6E Invs,* 2018 WL 582314, at *6 ("the limitations of FHA disparate impact liability discussed in *Inclusive*

requirement is any different than that in the Rule. *See, e.g., National Fair Housing Alliance v. Travelers Indemnity Co.*, 261 F. Supp. 3d 20, 29-30 (D.D.C. 2017) (rejecting argument that the robust causality requirement rendered pre-ICP causation findings as unsound, stating that ICP "does not require courts to abandon common sense or necessary logical inferences that follow from the facts alleged"); *Azam v. City of Columbia Heights*, 2016 WL 424966, at *10 (D. Minn. Feb. 3, 2016), *aff'd*, 865 F.3d 980 (8th Cir. 2017) (citing both the Rule and ICP interchangeably in discussing the causation requirement).

Thus, while the robust causality requirement set forth in ICP has resulted in a closer examination of causation in post-ICP cases, there is no indication that the Rule is inconsistent with this requirement. Therefore, it does not require any modification of the Rule.

Additionally, since the ICP decision in 2015, the Supreme Court has addressed a different causation issue in *Bank of America v. City of Miami,* 137 S. Ct. 1296 (2017). The standard for determining whether the discrimination alleged in fair housing cases is the proximate cause of the injuries alleged. The issue has arisen only in cases alleging discriminatory lending policies in cases brought by cities against banks. The Rule concerns the formalization of a long-recognized legal interpretation of disparate impact liability and the burden-shifting framework developed over several decades. The proximate cause requirement raised in *Bank of America* is not directly related to disparate impact liability and has just begun to be considered by lower courts for the first time. As such, it is inappropriate to interject it into the Rule.

5. Should the Disparate Impact Rule provide defenses or safe harbors to claims of disparate impact liability (such as, for example, when another federal statute substantially limits a defendant's discretion or another federal statute requires adherence to state statutes)?

The answer is no. Exemptions and safe harbors from FHA liability have only been recognized when they are set forth in specific statutory provisions. Three were discussed in ICP: an exemption for those engaged in the business of furnishing appraisals of real property, 42 U.S.C. 3605(c); an exemption from liability for actions taken against any such person who has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance, 42 U.S.C. 3607(b)(4); and an exemption against actions for setting reasonable restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. 3607(b)(1).

But, courts have rejected the arguments of a landlord seeking an exemption from disparate impact claims for withdrawing from the Section 8 voucher program, holding that categorical exemptions cannot be created by a court without a statutory basis. *See e.g. Graoch Associates # 33 L.P. v, Louisville/Jefferson County Metro Human Relations Comm'n,* 508 F3d 366, 374 (6th Cir. 2007); *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107 (Mass. 2016).

Communities does not, as a matter of law, prohibit disparate impact claims that challenge a single decision by a municipality's governing body").

Debates in the 1980s over amendments to the FHA also demonstrate why categorical exemptions should not be imposed by regulation or by judicial decision. Unlike the exemptions from disparate impact liability for home appraisals, the distribution or manufacture of controlled substances, and reasonable occupancy standards, Congress expressly rejected an amendment offered by Senator Orrin Hatch in 1980 that would have exempted land use and zoning decisions from disparate impact liability. They did so because such an exemption would have undermined the underlying statutory goals of promoting integration and access to opportunity while eradicating discrimination. The same logic explains Congress's decision not to include exemptions for other types of activity that courts have found to give rise to disparate impact liability for decades, including discrimination in the provision of homeowners' insurance.

III. Conclusion

The HUD Rule was promulgated in 2013 to formalize HUD's and the courts of appeals' long-held interpretation of the availability of discriminatory effects liability under the FHA and to provide nationwide consistency in the application of that form of liability. "HUD, through its longstanding interpretation of the Act, and the eleven federal courts of appeals that have addressed the issue agree that liability under the Fair Housing Act may arise from a facially neutral practice that has a discriminatory effect." 78 Fed Reg. 11,460.

Since the ICP decision, no court has found any inconsistency between the ICP decision and the Rule. These decisions have carefully analyzed the cautionary language in ICP, but none has indicated the need or propriety of modifying the Rule. Furthermore, consideration of the questions posed in the HUD ANPRM through the lens of the exclusionary zoning cases and other decisions demonstrates that any modification of the Rule would be inappropriate and would undermine the goal of the Rule to provide nationwide consistency in considering disparate impact liability. HUD should make no changes to the Rule.

Respectfully submitted,

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